

GUSTAVUS B. HORNER—LEGAL REPRESENTATIVES OF.

[To accompany Bill H. R. No. 401.]

MARCH 19, 1860.

Mr. DE JARNETTE, from the Committee on Revolutionary Claims, made the following

REPORT.

*The Committee on Revolutionary Claims, to whom was referred the petition of the legal representatives of Gustavus B. Horner, report :*

That the petitioners are the legal representatives of Dr. Gustavus B. Horner. They claim commutation of five years' full pay, or half-pay for life, as justly due to them for his services as surgeon's mate ; and they rest their claim on the promises made by Congress on the 21st of October, 1780, the 17th of January, 1781, and by the act of March, 1783.

It is clearly proved that Dr. Horner was a surgeon's mate of the general hospital of the middle district by commission from the Continental Congress, dated in 1778 ; that he was in actual service for about four years, and until the autumn of 1782, and after the French forces had returned to the north from the surrender of the enemy at Yorktown, Virginia.

It is probable that he was not again engaged in active service during the few remaining months of the war which elapsed after that period ; but it appears, from the evidence filed with the petition, that he did not, after the aforementioned actual service, resign his commission, but only retired as a supernumerary, ready for service whenever he should be required ; for, in addition to the other parole evidence, it appears that he held his commission till the end of the war ; and the commission itself, left by him among his papers, is now produced by the petitioners.

And as evidence of the view in which the legislature of Maryland (of which State he was a citizen, and in whose line he served) regarded his services, they also file a copy of a resolution of the general assembly of that State, allowing to his widow a pension for her life equal to the half-pay of a surgeon's mate, in consideration of the revolutionary service of her husband in the line of the State.

In Marston's case, 9th Leigh's Reports, Judge Brockenborough delivers the opinion of the court, and says : " If the government allege a resignation, it is bound to prove it. Attorney General Cushing maintains that all supernumeraries were in service till the end of the

war." We think, then, we may safely affirm that the legal representatives of Dr. Horner are, from the proofs exhibited in their case, entitled to half-pay for life, if surgeon's mates are entitled to such compensation under the resolutions of Congress.

The only question which has arisen to obstruct this claim is, that in the resolution of Congress in 1781, providing for the medical and hospital department, surgeon's mates, *eo nomine*, are omitted, while physicians, surgeons, apothecaries, purveyors, and other inferior and subordinate classes, all belonging to the hospital department, are mentioned and provided for. The committee believe that the omission of surgeon's mates, a class commissioned by Congress as useful and indispensable to the service, was either accidental (*a casus omissus*) or was intended and regarded as embraced in the generic term surgeons, before mentioned, by the resolution of Congress in the list of officers of the hospital.

In either of these constructions, surgeon's mates may be considered as within the law; but if not embraced in the law, they certainly are within equity of the provision intended by the Congress of the confederation.

After the war was over, in the early and needy days of the government, a strict construction of the resolutions of 1781 was adopted, excluding every class of officers not expressly named. This strict construction prevailed for many years thereafter, and is still adhered to in the executive departments of the government, and hence no application in this case, and other cases like it, was made to Congress.

Since then, however, in several cases, Congress have passed special bills in behalf of surgeon's mates, acknowledging a more liberal construction of the resolution of Congress to be just; and each house of Congress has separately, at different times, passed resolutions declaring that the true construction of the resolution of the old Congress includes surgeon's mates.

This identical question was presented, in the case of Samuel T. Keene, a surgeon's mate, in the 29th Congress, and settled in favor of the position now taken by this committee. Three other cases were settled in the same way by the same Congress, to wit: Drs. Yates, Savage, and Pryor, and may be seen in the 4th volume of Committee Reports of the House of Representatives, 2d session, 29th Congress, Nos. 854, 855, 856.

The report in the case of Samuel T. Keene may be found in volume four of same reports, same session and Congress, No. 887.

In the case of the present memorial, which was first presented to Congress in 1835, the Senate of that year passed a bill deciding the above question in the same way, and recognizing the services of Dr. Horner. The Senate has twice since that time passed the same bill. There was no action on these bills in the House of Representatives.

In the last Congress the House of Representatives passed a bill giving the legal representatives of Dr. Horner half-pay for life, but it was not acted on in the Senate. The committee are of opinion that the petitioners are justly entitled to the relief prayed for, viz: half-pay for life, and unanimously report a bill accordingly, and recommend its passage.